90-1103 (1)

NO.

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

LYNN BEAUCOUDRAY, WIFE OF/AND JAMES EDWARD KELTY, JR., INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILD, ANN MARY KELTY

Petitioners

VERSUS

DOUGLAS D. GREEN, THE OFFICE OF THE COMMISSIONER OF INSURANCE OF THE STATE OF LOUISIANA, THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF LOUISIANA AND THE LOUISIANA PATIENT'S COMPENSATION FUND

Defendants

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Are the federal and state constitutional guarantees of due process and equal protection denied to petitioners herein by *excluding* them, as a class, from receiving medical benefits after the Louisiana Supreme Court determined that the state statute which provided future medical benefits to victims of medical malpractice was ". . . a clear violation of the Louisiana constitutional guarantee of equal protection and the statute . . . must be reformed to apply to claims and litigation pending when it was passed"?

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Section 3. No person shall be denied the equal protection of the laws. no law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntarily servitude are prohibited, except in the latter case as in punishment for crime. 6,12

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

The Petitioners, Lynn Beaucoudray, wife of/and James Edward Kelty, Jr., individually and on behalf of their minor child, Ann Mary Kelty, respectfully pray that a writ of certiorari issued to review the judgment of the Supreme Court of the State of Louisiana, entered in this proceeding on September 6, 1990, reconsideration denied October 5, 1990, in which this court affirmed the opinion of the Court of Appeals, Fourth Circuit, State of Louisiana, entered March 29, 1990.

OPINIONS BELOW

The opinion of the Louisiana Court of Appeals, Fourth Circuit is reported at 559 So.2d 907 (La.App. 4 Cir. 1990); writ denied 565 So.2d 939 (La. 1990); application for rehearing denied 567 So.2d 92 (La. 1990).

JURISDICTION

The judgment of the Supreme Court of the State of Louisiana was entered on September 6, 1990. A timely petition for rehearing was denied on October 5, 1990, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(a).

STATEMENT OF THE CASE AND FACTS

On July 18, 1978, Lynn Beaucoudray Kelty, petitioner herein, gave birth to a baby girl, Ann Mary Kelty. Mrs. Kelty's obstetrician was Fred O. Brumfield, M.D., and the hospital in which the child was born was Southern Baptist Hospital. At birth, Ann Mary Kelty suffered from severe and profound mental retardation caused by the negligence of the physician and, to date, possesses the I.Q. of a newborn. Ann Mary Kelty requires around the clock nursing care and an extraordinary amount of medical attention which is paid for by her parents, as they can. Petitioners filed a medical negligence claim against Dr. Brumfield and Southern Baptist Hospital pursuant to LSA-R.S. 40:1299.41, et seq. In their petition, the petitioners alleged that Louisiana Revised Statute, LSA-R.S. 40:1299.42, "... in placing limitations on the amount of money in damages that petitioners may recover is unconstitutional, as it denies the right of petitioners to bring a cause of action, for damages that are compensable for the injuries inflicted

upon them, by defendants, in as much as this is an abridgement of the federal and state guarantees of equal protection and due process and petitioners ask this Court to declare this statute unconstitutional."

Petitioners settled their claim with Southern Baptist Hospital and, on the eve of trial, November 2, 1987, Dr. Brumfield admitted his liability and paid the statutory limit, in damages, to the petitioners. Louisiana Revised Statute LSA-R.S. 40:1299.42(B) provides that a health care provider shall not be liable for more than one hundred thousand dollars ($100,000.00) and no litigant shall collect more than five hundred thousand dollars ($500,000.00), the difference being paid by the Louisiana Patient's Compensation Fund, (the Fund). LSA-R.S. 40:1299.44(c). These statutory limitations are *not* questioned, herein. The right to recover future medical care and related benefits is.

Dr. Brumfield and Southern Baptist Hospital were dismissed from the lawsuit and petitioners proceeded against the Fund for damages, up to the statutory cap and for future medical benefits. The Fund conceded that damages exceeded five hundred thousand dollars ($500,000.00) and then proceeded to file an exceptions of prescription (statute of limitations). The trial court overruled the exception of prescription and awarded the plaintiffs damages in the amount of five hundred thousand dollars ($500,000.00) and then proceeded to file an exception of prescription (statute of limitations). The trial court overruled the exception of prescription and awarded the plaintiffs damages in the amount of five hundred thousand dollars ($500,000.00). The fund appealed this decision and petitioners answered the appeal, alleging again, that the issue of constitutionality had not been addressed. Petitioners further argued that they were never allowed to proceed to trial on the merits of this case and never have, to test

the issues of constitutionality, due to the fact that the Fund stipulated that damages exceeded the cap of five hundred thouseand dollars ($500,000.00).

On November 10, 1988, the Court of Appeals in *Kelty v. Brumfield*, 534 So.2d 1331 (La. App. 4 Cir. 1088) ruled:

1) The trial court was correct in denying the Fund's exception of prescription;

2) Petitioners were not entitlted to seek future medical benefits due to the guidelines of applicability as set forth in LSA-R.S. 40:1299.43 . (It is important to note that at the very time of the Court of Appeals' ruling, the Louisiana Supreme Court had under consideration a writ of certiorari to test the constitutionality of this very statute);

3) Acknowledged that the issue of the constitutionality of the statutory cap was presently under consideration by the Louisiana Supreme Court (in an opinion later rendered in the case of *Williams v. Kushner*, 549 So.2d 294 (1989)) and reserved to plaintiffs the right to proceed to trial *on the issue of quantum*, should the Louisiana Supreme Court find the statute unconstitutional.

Petitioners sought writs to the Louisiana Supreme Court on December 12, 1988, again seeking this Court's opinion as to the constitutionality of the statute and, more importantly, the applicability of the award of future medial benefits. The writs were denied on January 13, 1989.

It is extremely significant to note that on the date the Louisiana Supreme Court denied petitoners' writs, it had already granted writs to consider this very issue in the

case of *Williams v. Kushner,* 549 So.2d 294, and its opinion, rendered some eight months later on September 12, 1989, found the statute unconstitutional as it applied to the award of future medical benefits. Had the Court held petitioners' writ, instead of denying it, a similar ruling might have followed.

At issue in both the *Kelty* case and the *Williams* case was that the State of Louisiana, thought its legislature, enacted two different statutes which enabled proven victims of medical malpractice the opportunity to seek future medical benefits and related expenses. LSA-R.S. 40:1299.43 provided future medical benefits to any patient who was injured in a *private sector facility.* LSA-R.S. 40:1299.39 awarded future medical benefits to any patient who was injured in a *state run facility.*

In its opinion in the *Williams* case, the Supreme Court said:

> **"III. FUTURE MEDICAL CARE AND RELATED BENEFITS**
>
> While the third issue was not assigned as error in the precise language used here, the issue is implicit in the arguments urged by relator. Treatment of the question of medical benefits is appropriate at this time.
>
> [2] In 1984, Act 435 enacted LSA-R.S. 40:1299.43 to provide that the cost of "future medical care and related benefits" is excluded from the $500,000 limitation on recovery in private sector claims. In 1985, the same exception was made with regard to malpractice claims against the state. However, the 1984 private sector act applies only to malpractice claims filed

"on or after September 1, 1984," and would exclude the present claim. The 1985 act applies to "pending claims and litigation." Thus, if Mark Williams had been injured at birth in a state facility under the care of a state employee, his future medical expenses could be recovered. Because he was born in a private hospital under the care of a private physician, these expenses are legislatively placed in a different category. This anomaly is a clear violation of the Louisiana constitutional guarantee of equal protection.

Despite wording to the contrary, *Act 435 of 1984 must be reformed to apply to claims and litigation pending when it was passed.* Plaintiff here is entitled to a judgment for the benefits provided.

For the foregoing reasons, the judgment of the court of appeal is amended to award plaintiff any future medical benefits according to LSA-R.S. 40:1299.43. The judgment of the court of appeal, which upheld a $400,000 award against the Patient's Compensation Fund, is affirmed as amended." (emphasis added)

Because the Supreme Court, in declaring the future medical care section of the statute unconstitutional, made its application for the award of future medical benefits *retroactive*, petitioners, on November 10, 1989, filed a rule to fix medical expenses pursuant to the opinion of the Supreme Court in *Williams*, supra.

The trial court agreed with petitioners and found that due to the unconstitutionality of the statute and due to its retroactive application, petitioners were entitled to seek future medical benefits. At this time, the Fund filed an

exception of res judicata, which was denied by the trial court.

The Fund sought an application for supervisory writs to the Court of Appeals, Fourth Circuit, State of Louisiana, alleging that, in part, although the decision in *Williams* should apply to petitioners, and even thought *Willliams* specifically stated that its application was retroactive, the matter had already been decided and was therefore res judicata.

The Court of Appeals agreed and found that res judicata applied," . . . even though *Williams v. Kushner*, 549 So.2d 294 (1989), apparently makes this Court's previous ruling incorrect, plaintiffs cannot avail themselves of this error to revise their claim." *Kelty v. Brumfield*, 559 So.2d 907, at pg. 909.

Petitioners applied to the Supreme Court of the state of Louisiana for supervisory writs and the application for writs was denied, without reason, by a vote of 4 to 3 on September 6, 1990. The petition for rehearing was denied, without reason, on Octobver 5, 1990. This application for writs followed.

REASONS FOR GRANTING WRIT

The Louisiana Supreme Court, although correctly ruling that LSA-R.S. 40:1299.43 violated the Louisiana constitutional guarantee of equal protection, and must be reformed to apply to claims and litigations pending when it was passed, (1984), has, in refusing to provide petitioners access to future medical benefits for their injured child, violated the state and federal constitutional guarantees of equal protection and due process of petitioners.

The Louisiana Supreme Court, in attempting to cure constitutional infirmities, has created constitutional deprivations of equal protection and due process by failing to apply the very law which it enacted.

"Under the fourteenth Amendment, due process emphasizes fairness between state and individual dealing with the state, regardless of how other individuals in same situation may be treated; equal protection, on the other hand, emphasizes disparity in treatment by state between classes of individuals whose situations are arguably indistinguishable." *Ross v. Moffitt* (1974), 417 U.S. 600, 41 L.Ed. 2(d) 341, 94 S.Ct. 2437.

The constitutional infirmities which the Louisiana Supreme Court, in *Williams*, allegedly corrected, unfortunately, continue. although the Court ruled that Act 435, LSA-R.S. 40:1299.43, as enacted, was unconstitutional, and should be reformed to apply to any claim or litigation pending in 1984, this very Court now fails to follow its own guidelines in implementing and applying its decision. In fact, LSA-R.S. 40:1299.43, even though adjudged unconstitutional by the Louisiana Supreme Court, remains in effect, and its wording unchanged, to date.

The Louisiana Legislature, in Act No. 239 of 1985, enacted LSA-R.S. 40:1299.39, which provided for the payment of future medical care and related benefits to victims of medical malpractice injured in *state run facilities*, is found in Appendix A.

The Louisiana Legislature, in Act No. 435 of 1984, enacted LSA-R.S. 40:1299.43, which provided for the payment of future medical care and related benefits to victims of medical malpractice injured in *privately run facilities*, is found in Appendix B.

It is quite obvious, in reading these statutes, together, that a victim of medical malpractice stood the chance of receiving a much greater award, in actual dollars received, if his medical malpractice occurred while he was in a state run hospital as opposed to a privately owned and operated hospital.

"The purpose of the equal protection clause in the Federal constitution is to rest rights of all persons upon same rule under same circumstances." *Frost v. Corporation Com. of Oklahoma* (1929) 278 U.S. 515, 73 L.Ed.483, 49 S.Ct. 235.

The Keltys, in realizing as "private sector litigants", if you will, the inequities between awards to private sector litigants and state sector litigants, in their original petition for damages, filed in 1985, alleged that the statutes, as written were" . . . an abridgment of the federal and state guarantees of equal protection and due process and petitioners ask this Court to declare this statute unconstitutional."

Although petitioners were correct when, in 1985, in their original petition for damages, they asserted that the two statutes were at odds with each other and created different classes of litigants and therefore violated the equal protection clauses of both the Louisiana and the Federal constitutions, it took many years before the Louisiana Supreme Court recognized this and ruled accordingly in *William v. Kushner,* supra. Furthermore, the Louisiana Supreme Court, in giving their ruling retroactive effect, realized that there were many successful medical malpractice litigants who were deprived of the necessary future medical care between the years 1984, the year the statute was enacted and 1989, the year the Louisiana Supreme Court ruled the statute unconstitutional. Hence they

stated:

> "Despite wording to the contrary, Act 435 of 1984 must be reformed to apply to claims and litigation pending when it was passed. Plaintiff is entitled here to a judgment for the benefits provided."

Of course, there were many claimants, such as the Keltys, who had requested future medical benefits but were denied due to the wording of the statute. Obviously, that is why the Supreme Court gave their holding in *Williams v. Kushner* a curative effect by making it apply retroactively.

Although the lower court held, in applying the Louisiana Supreme Court ruling in *Williams*, that the Keltys were entitled to future medical benefits, the Louisiana Fourth Circuit Court of Appeals held that the Keltys' claim for these benefits was now res judicata. This is preposterous.

The Supreme Court determined that in order to remove these constitutional infringements the parties so aggrieved would have their wrongs righted by the retroactive application of this statute back to 1984, when it was passed.

However, when litigants who were denied benefits due to the unconstitutional application of the statute, such as the Keltys, seek to judicially obtain future medical benefits, they get turned away on an exception of res judicata, thereby creating a constitutional dichotomy, i.e., in order to seek benefits which they were denied due to an equal protection violation, they are now denied *access* to these benefits, which is a violation of their due process guarantees.

It is apparent that the State of Louisiana, through its legislature, and through the judicial system, has enacted and applied laws which establish a classification of individuals which is in violation of the Fourteenth Amendment of the federal constitution and in violation of the state constitution as the Supreme Court of Louisiana has so ruled, in *Williams.* However, the due process clause of the Fourteenth Amendment of the federal constitution has been violated by not allowing the petitioners access to future medical benefits even though retroactive application, removing the equal protection infirmities, has been mandated by the Supreme Court of the State of Louisiana. Obviously, there has not been a fair administration of justice.

The Louisiana Supreme Court has, perhaps, given some thought to the retroactive application that they so gratuitously gave to all litigants in their opinion in *Williams v. Kushner,* supra. Since the Fund is a budget unit of the State of Louisiana, is the Louisiana Supreme Court politically motivated by denying, without reason, petitioners' request for writs of certiorari to review the judgment of the Louisiana Fourth Circuit Court of Appeals? Does it fear that by paying benefits to all litigants who were constitutionally deprived, it might bankrupt the state of Louisiana.

"Local tradition cannot justify failure to comply with constitutional mandates requiring equal protection of law." *Eubanks v. Louisiana* (1958) 356 U.S. 584, 2 L.Ed. 2d 991, 78 S.Ct. 970.

"The Fourteenth Amendment was not intended to bring within federal control everything done by states or by its instrumentalities that are simply illegal under state laws, but only such acts by states or their instrumentalities

as are violative of rights secured by the Constitution of the United States." *Owensboro Water Works Company v. Owensboro* (1906), 200 U.S. 38, 50 L.Ed 361, 26 S.Ct. 249.

Obviously, only the Supreme Court of the United States can cure the constitutional infirmities created by the Louisiana Supreme Court. Does a successful medical malpractice litigant in Louisiana have to accept a due process violation in order to gain an equal protection victory? We think not.

Petitioners respectfully pray that the writs be granted.

Respectfully submitted:

/s/ Kenneth V. Ward, Jr.
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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 3rd day of January, 1991, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing same by United States mail, properly addressed, and first class postage prepaid.

_____

KENNETH V. WARD, JR.

APPENDIX A

PART XXI-A. MALPRACTICE LIABILITY FOR STATE SERVICES

§ 1299.39. Definitions and general application

A. As used in this Part:

(1)(a) "State health care provider" or "person covered by this Part" means:

(i) The state or any of its departments, offices, agencies, boards, commissions, institutions, universities, facilities, hospitals, clinics, laboratories, health care units, ambulances, ambulance services, university health centers, and other state entities which may provide any kind of health care whatsover, and the officers, officials, and employees thereof when acting within the course and scope of their duties in providing health care in connection with such state entity; or

(ii) A person acting in a professional capacity in providing health care services, by or on behalf of the state, including, but not limited to, a physician, psychologist, dentist, registered nurse, licensed practical nurse, pharmacist, optometrist, podiatrist, physical therapist, laboratory or x-ray technician, clinical social worker, or hospital administrator, who is either

(aa) Acting within the course and scope of his employment pursuant to a contract with the state, which contract specially names that health care provider and designates him to render such health care services, pursuant to a staff appointment to a state hospital or other state health care facility, or pursuant to an assignment to

render such health care services for or on behalf of the state, without regard to where the services are performed, whether or not he is paid for such services; or

(bb) Performing voluntary professional services in a health care facility or institution for or on behalf of the state; or

(iii) A resident, intern, or student of, or any person who is otherwise qualified in, any discipline, including but not limited to, the disciplines listed in this Subsection when he is acting within the course and scope of the training or staff appointment in and under the supervision of a state hospital or other health care facility to which he is assigned as a part of his prescribed training in such discipline, without regard to where the services are performed.

(iv) A physician, surgeon, dentist, or hospital, and any employee of a physician, surgeon, dentist, or hospital not otherwise included in Subsubparagraphs (i), (ii), or (iii), herein, who gratuitously treats or provides services to any patient referred to it from a state hospital or other state facility without compensation or reimbursement from medicaid or from any type of state or federal public assistance program, or who gratuitously treats or provides services to any patient eligible for admission from a state hospital or other state facility without compensation or reimbursement from medicaid or from any type of state or federal public assistance program, when the patient is certified by the state hospital or other state facility, no later than the end of the next business day after the patient presents himself for treatment, to be eligible for admission to the state hospital or other state facility, only as it relates to services provided to that patient. However, no person or entity referenced in this Subsubparagraph shall be considered a "state health care provider" or "person covered

by this Part" for any injury to or death of the patient resulting from any act or omission of gross negligence or any willful or wanton act or omission.

(b) "State health care provider" or "person covered by this Part" shall not mean and shall not include a political subdivision of the state nor any hospital, hospital service district, or any other health care facility of a political subdivision, nor shall it mean or include any individual acting in a professional capacity in providing health care services not by or on behalf of the state.

(2) "Physician" means a person with a license or permit to practice medicine in this state.

(3) "Patient" means a natural person who receives, or should have received, health care from a person covered by this Part and any other natural person or persons who would or may have a claim or claims for damages under applicable law arising out of , or directly related to, the claim or claims of the natural person who receives, or should have received, health care from a person covered by this Part.

(4) "Malpractice" means the failure to exercise the reasonable standard of care specified and required by Subsection B of this Section, in the provision of health care, when such failure proximately causes injury to a patient, as provided in Subsection B of this Section.

(5) "Representative" means a person who is a parent tutor, curator, spouse, trustee, attorney, or other legal agent of the patient and who is authorized, by and on behalf of the patient, to exercise any of the patient's rights, privileges, or immunities granted by this Section or to fulfill any of the patient's obligations, duties, or

forbearances imposed under this Section, because the patient has executed a written authorization and mandate to that effect or because the law operates to that effect due to the status of that patient and his relationship to such person, as when the patient is a minor child and his parent must act for him. After the death of the patient, "representative" shall also mean and include the executor of a patient's will, the administrator of his estate, the surviving spouse of the patient, the patient's children, or, if they are minors, their legal representatives, and of the patient's heirs, successors, legatees, or assigns, and/or any other person who may have any interest in any recovery arising out of the death of the patient or in the bringing of any action or the making of any demands or claims with regard to such patient.

(6) "Health care" means any act or treatment which was performed or furnished or which should have been performed or furnished by any person covered by this Part for, to, or on behalf of, a patient during the medical care, treatment or confinement of the patient.

(7) "Future medical care and related benefits" for the purposes of this Section, means all reasonable medical, surgical, hospitalization, physical rehabilitation, and custodial services, including drugs, prosthectic devices, and other similar materials reasonabaly necessary in the provision of such services, to which the injured patient is entitled under the provisions of this Section and which each injured patient needs after the date of the injury. "Future medical care and related benefits" as used in this Section shall not be construed to mean nonessential specialty items, or devices of convenience.

(8) "Ambulance service" means an entity which operates either ground or air ambulances, using a minimum

of two persons on each ground ambulance, at least one of which is trained and registered at the level of certified medical technician-basic, or at the intermediate or paramedic levels, or one who is a registered nurse, and using a minimum on any air ambulance of one person trained and registered at the paramedic level or a person who is a registered nurse or any officer, employee, or agent thereof acting in the course and scope of his employment.

(9) "Right to recover losses due to malpractice" means the substantive right in favor of a patient or his representative to receive, subject to the fiscal legislative discretion of appropriation, some measure of compensation in money or services or both from the state, as and to the extent allowed by this Section, toward repairing any injury or losses proximately caused by an act of malpractice committed by a state health care provider as defined in this Section.

B. (1) The standard of reasonable care specified and required by this Section is as follows: The standard of care specified and required by this Section for licensed physicians and dentists shall be the same as that required to be proven with respect to them under the provisions of R.S. 9:2794.

(2) No breach of the standard of reasonable care required under the provisions of this Section shall constitute malpractice within the meaning of this Section, nor shall it give grounds for any recovery or liability, without its also being the proximate cause of each injury for which a recovery in damages is sought. A patient injured must fall within the specific class of persons legislatively intended, by the purpose and design of this Section, to be protected against such breaches of the standard of reasonable care set forth in this Subsection, the resulting injury must be of

the kind specifically intended and designed by this Section to be prevented by the standard of reasonable care set forth in this Subsection, and the resulting injury and the damages sought therefor must fall within the type of injury and damages for which a recovery is allowable by the purpose and intent of this Section in light of the particular legislative provisions, finding, and the purposes expressed in this Section.

C. Since the Louisiana Civil Code was enacted only in the domain of the private law, governs only the legal relationships of private persons among themselves alone, and is inapplicable to public entities and their legal relationships, there is no right nor legal basis ex delicto, or ex quasi-delicto,[1] for an action by a patient or his representative to recover damages or any other losses, including those for the death of the patient, from the state or a state health care provider as defined in this Section as a result of malpractice in connection with state-provided or state-related health care; however, a patient, his representative properly acting for him, or his after-death representative shall have a right to recover from the state certain losses to the extent and within the limitations defined and allowed by this Section of public law due to malpractice as defined in this Section, in the circumstances and within the parameters provided by this Section, on the sole basis of this Section as a special substantive sui generis statutory grant in the domain of public law. This Section shall not be construed to limit, waive, or prohibit claims for lack of informed consent or breach of contract as defined by statutes or otherwise provided by law.

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[1] "Ex quasi-delicto" in subsec. C of the section as amended in 1989 is as appears in enrolled bill (Acts 1989, No. 568).

D. (1) Whenever in the same circumstances, but not more than to the same extent, that a patient would, under the private law, including the Louisiana Civil Code, which is applicable only to private persons among themselves alone, be allowed a recovery, due to malpractice, from a private person not employed by nor acting on behalf of a public entity, a patient, his representative properly acting for him, or his after-death representative shall have a right to recover, from the state, losses, including the death of said patient, but only to the degree and within the limits allowed by, and subject to the terms and conditions of, this Section of public law, when and insofar as such losses proximately result from malpractice as defined in this Section and not from victim fault, third party fault, acts of God, acts of third parties, or contributory negligence or fault and when there exist no breaches of duty by such patient or his agents or representatives with respect to the damages sued for, no assumption of risk by patient with respect thereto, nor any other circumstance which would otherwise provide a defense or a basis of nonrecovery in any action in contract or quasi-contract or in any action arising out of any offense or quasi-offense. Whenever victim fault, third party fault, acts of God, acts of third parties, contributory negligence, or contributory fault is a substantial factor in causing such losses, the amount of recovery available from the state under this Section shall be reduced by the same percentage or proportion as such losses were brought about or resulted from such victim fault, third party fault, acts of God, acts of third parties, contributory negligence, or contributory fault. Otherwise than as provided by this Section of public law, a patient shall not have a right to recover losses due to malpractice from the state or from a state health care provider as defined in this Section.

(2) In actions allowed and authorized by and brought

pursuant to this Section, third party demands and other actions for indemnification and contribution shall be recoverable in the same circumstances and to the same extent as otherwise provided by law, but only insofar as such actions, demands, and/or recovery do not conflict with the provisions or intent of this Section. Judicial interest shall be allowed as otherwise provided by law, except that none shall be allowed on future medical care and related benefits.

E. (1) Unless the medical malpractice claim is first compromised and settled in accordance with Subsection H of this Section or unless the state, through the concurrence of the office of risk management and the legal counsel representing the state against such claim, waive the medical review panel procedure, all medical malpractice claims by their patients or their representatives arising from the right created and granted by Subsections C and D of this Section shall be submitted to administrative review in accordance with this Subsection before such right in individual claims can become sufficiently existent to be susceptible of judical recognition or adjudication. The medical malpractice claims of prisoners arising under this Part shall be submitted to correctional administrative review procedures established in accordance with express law, including R.S. 15:1171 et seq., R.S. 49:964, and the administrative rules and regulations pertaining thereto. All other medical malpractice claims arising under this Part shall be submitted to a medical review panel in accordance with R.S. 40:1299.39.1.

(2) All claims and complaints submitted to a medical review panel in accordance with R.S. 40:1299.39.1 shall conform at a minimum to the requirements of Rules, 8, 9, and 10 of the Federal Rules of Civil Procedure.

F. Notwithstanding any other provision of the law to

contrary, no judgment shall be rendered and no settlement or compromise shall be entered into for the injury or death of any patient in any action or claim for an alleged act of malpractice in excess of five hundred thousand dollars plus interest and costs, exclusive of future medical care and related benefits valued in excess of such five hundred thousand dollars. In claims which may include future medical care and related benefits, the following procedures shall apply:

(1) The court's judgment or the settlement or compromise shall include a recitation that the patient is or is not in need of future medical care and related benefits and the amount thereof.

(2) If the total amount of the value of the judgment or settlement or comprise is for five hundred thousand dollars, plus interest and costs, exclusive of the value of future medical care and related benefits, all future medical care and related benefits shall be paid in accordance herewith.

(3) If the total amount of recovery, excluding interest and costs but including the amount of future medical care and related benefits, does not exceed five hundred thousand dollars, judgment may be rendered for the total amount and paid by the state as provided by Subsection I.

(4) The district court from which final judgment issues shall have continuing jurisdiction in cases where future medical care and related benefits are determined to be necessary. Such continuing jurisdiction shall be limited to matters of future medical care and benefits as provided in the Subsection.

(5) Nothing in this Subsection shall be construed to

prevent a claimant and the state from entering into a court-approved settlement or agreement whereby future medical care and related benefits shall be provided for a limited period of time or to a limited degree.

(6) If the total amount of recovery awarded against the state, excluding interest and costs but including the amount of future medical care and related benefits, exceeds five hundred thousand dollars, the claimant may make a claim to the office of risk management for all future medical care and related benefits.

(7) Payments for medical care and related benefits shall be paid by the office of risk management pursuant to Subsection L, without regard to the five hundred thousand dollar limitation imposed in this Subsection.

(8) The court shall award reasonable attorney fees to the claimant's attorney if the court finds that the office of risk management unreasonable fails to pay for medical care within sixty days after submission of a claim for payment of such benefits together with proper substantiation therefor.

(9) The office of risk Management shall be entitled to have a physical examination of the claimant performed by a physician of the office of risk management's choice from time to time for the purpose of determining the validity of any claim submitted or the claimant's continued need of future medical care and related benefits, subject to the folowing requirements:

(a) Notice in writing shall be delivered to or served upon the claimant or the claimant's counsel of record at least ten days prior to an examination specifying the time and place of the intended examination. Delivery of the

notice may be by certified mail.

(b) Such examination shall be by a licensed physician or chiropractic physician licensed under the laws of this state or of the state, parish, or county wherein the claimant resides.

(c) The place at which such examination is to be conducted shall not involve an unreasonable amount of travel for the claimant considering all circumstances. It shall not be necessary for a claimant who resides outside this state to come into this state for such an examination unless so ordered by the court.

(d) Within thirty days after the examination, the claimant shall be compensated by the office of risk management for all necessary and reasonable expenses incidental to submitting to the examination, including the reasonable costs of travel, meals, lodging, loss of pay, or other direct expenses.

(e) Examinations may not be required more frequently than at six-month intervals, except that, upon application to the court having jurisdiction of the claim and after reasonable cause shown therefor, examination within a shorter interval may be ordered. In considering such application, the court should exercise care to prevent harassment to the claimant.

(f) The claimant shall be entitled to have a physician or an attorney of his choice or both present at such examination. The patient shall pay such physician or attorney himself.

(g) The claimant shall be promptly furnished with a copy of the report of the examination made by the physi-

cian making the examination on behalf of the future medical benefits fund.

(10) If a claimant fails or refuses to submit to examination in accordancae with a notice, and if the requirements of Paragraph (9) have been satisfied, then the claimant shall not be entitled to attorney fees in any action to enforce rights pursuant to Paragraph (8) and may be subject to denial payment of any claim submitted for payment.

(11) Any physician selected by the office of risk management who shall make or be present at an examination of the claimant conducted in pursuance of this Subsection may be required to testify as to the conduct thereof and the findings made. Communications made by the claimant upon such examination by such physician or physicians shall not be considered privileged.

(12) All reasonable fees and costs of medical examinations and the costs and fees of the medical expert witnesses in any proceeding in which the termination of medical care and related benefits is sought shall be paid by the office of risk management.

G. Notwithstanding any other provision of the law to the contrary, the state shall pay any damages, interest, cost of investigation and defense, and any other costs in connection with any claim lodged against any state health care provider (person covered by this Part) for an alleged act of medical malpractive, resulting in the injury or death of a patient up to the limits set forth in this Part. The coverage provided herein shall apply only when the state health care provider (person covered by this Part) is acting within the terms of the definition of "state health care provider"or "person covered by this Part" as provided in

Paragraph (1) of Subsection A of this Section.

H. Internally within the state government of Louisiana, the office of risk management shall have the primary responsibility for the administrative management of medical malpractice claims against the state. Copies of all claims shall be submitted to the office of risk management by claimants or their attorneys. In the administration of such claims, the office of risk management shall cause a timely and thorough investigation of the circumstances surrounding each malpractice claim, assemble all data relevant thereto, and coordinate with legal counsel for the defense of such cases. With the approval of such legal counsel, and in accordance with R.S. 39:1535, the office of risk management may compromise and settle any suit or claim up to the limits set forth in this Part. All malpractice claims not subject to such compromise or settlement shall be reviewed by a state medical review panel pursuant to R.S. 40:1299.39.1. In any suit or claim brought pursuant to this Part, the office of risk management may pay all defense and investigative costs, costs as established by the state medical review panel law, and any other costs incurred in connection with the defense of these actions as said costs accure.

I. (1) An attorney appointed in accordance with R.S. 49:258 shall be designated as the attorney to defend medical malpractice claims filed under this Part.

(2) Except for the claims designated in Subsection J, any written compromise or settlement effected between the state and the claimant with the approval of legal counsel designated as provided above shall be binding upon the claimant and the state subject only to the approval of such compromise or settlement by the district court of the parish where the claimant is domiciled or the state capital

is domiciled. The petition seeking court approval shall recite the essential facts alleged to constitute malpractice, the damages sustained, and the amount to be paid the claimant. The petition shall be executed by the claimant or his attorney and bay a legal counsel for the state. The court shall render and sign immediately a judgment, if it finds from an examination of the petition, attached exhibits, if any, and statements of the parties that the compromise or settlemsent is in the best interest of the state. All judgments shall be submitted for payment to the office of risk management.

J. The office of risk management, with the concurrence of counsel designated as provided for in Subsection I above, shall have the authority to compromise or settle, and pay any suit or claim brought pursuant to this Part up to twenty-five thousand dollars exclusive of interest and costs, without regard to the procedures outlined in Paragraph (2) of Subsection I above.

K. Any person covered by this Part shall be considered as a named insured. A health care provider who fails to qualify as a state health care provider under this Part is not covered by the provisions of this Part and is subject to liability under the private law without regard to the provisions of this Part. If a health care provider does not so qualify, the patient's remedy will not be affected by the terms and provisions of this Part, except as provided in this Part with respect to the suspension and the running of prescription of actions against a health care provider who has not qualified under this part when a claim has been filed against the health care provider for review under this Part. However, the running of prescription against a health care provider who is answerable in solido with a qualified state health care provider against whom a claim has been filed for review under this Part shall be

suspended for a period of ninety days after a panel is formed under the provisions of this Part, provided a claim is made against the in solido obigor either under the provisions of this Part or in a court of law within the ninety day period. For this purpose the panel shall be deemed to be formed on the date that the third health care provider member of the panel is chose.

L. (1) All future medical care and related benefits shall be paid by the office of risk management as are awarded in final judgments, settlements, or compromises in accordance with this Section.

(2) The office of risk management shall review all invoices received for future medical care and related benefits, prepare vouchers or warrants, and evaluate and settle claims relating to the payments of future medical care and related benefits. In submitting requests for payment, the claimant shall submit the original invoices.

(3) The parties may agree that any amount due for future medical care and related benefits be paid through a reversionary medical trust fund, or the purchase of an annuity contract by the office of risk management for and on behalf of the claimant.

M. The state shall not be liable for any injuries arising from the medical malpractice of any officer, official, employee, representative, appointee, agent, agency, district, hospital, clinic, service, facility, institution, or any health care provider of a political subdivision.

N. Nothing in this Part shall be construed to make the state liable for any sums except those arising from medical malpractice. Notwithstanding any other law to the

contrary, including but not limited to R.S. 13:5106, the provisions of this Part shall apply for medical malpractice actions against the state.

Amended by Acts 1978, No. 611, § 1, eff. July 12, 1978; Acts 1979, No. 130, § 1; Acts 1979 No. 450, § 1; Acts 1982, No. 851, § 1; Acts 1985, No. 239, § 1; Acts 1986, No. 141, § 1; Acts 1986, No. 965, § 1, eff. July 14, 1986; Acts 1988, No. 786, § 1; Acts 1989, No. 547, § 1, eff. July 5, 1989; Acts 1989, No. 568, § 1, Acts 1989, No. 826, § 1, eff. July 11, 1989.

Historical Note

1978 Amendment: Rewrote paragraphs A(1), A(4) and A(5) and subsections B and C, all of which previously read as set forth in the main volume, and added subsections D to G.

1979 Amendments: Act 130, in par. (1) of subsec. A, substituted "contract with the state" for "contract with the Department of Health and Human Resources"; divided subsec. E into two paragraphs, substituted a period for a comma at the end of the first paragraph, and in the second paragraph substituted "Subsection F, and" for "section F. Any" and substituted "as provided above" for "by the attorney general".

Act 450 added "licensed to practice in the state of Louisiana who is" and substituted "a similar" for "the same" before "community" in par. A(4).

1982 Amendment: In par. A(1), added "clinical social worker, or hospital administrator".

A comma was inserted following "administrator" in

text of Acts 1982, No. 851, § 1, on authority of R.S. 24:253.

1985 Amendment. Added par. (7) to subsec. A; and in subsec. B, substituted "provision" for "provisions",, deleted a comma following "rendered", substituted "interest" for "interests" and inserted ", exclusive of future medical care and related benefits valued in excess of such five hundred thousand dollars" in the first sentence, added the second sentence in the introductory paragraph, and added pars. (1) through (12); and added subsec. H.

In this section as amended in 1985, on authority of R.S. 24:253, in subsec. A)7), "purposes" was substituted for "purpose", and in subsec. H, par. (1), quotation marks were placed around "the fund" in the first sentence.

Acts 1985, No. 239, § 2, provides:

"The provisions of this Act shall apply to pending litigation and pending claims made pursuant to R.S. 40:1299.39."

1986 Legislation

Acts 1986, No. 141, § 1 inserted "ambulance service,", "or any political subdivision thereof" and "or his employer" in par. A(1), and added par. A(8) defining ambulance service and added subsec. I relative to political subdivisions, although the title of Act 141 made no reference to political subdivisions.

The title of Act 141 reflected an intent "To amend and reenact R.S. 40:1299.39(A)(1) and R.S. 40:1299.41(A)(1), and to enact R.S. 40:1299.39 (A)(8), R.S. 40:1299.41(A)(16), 1299.39(I), and 1299.41(I), relative to medical malpractice; to extend the limitation on malprac-

tice liability for state services to ambulance service employees; to include ambulance service within the definition of health care provider for purposes of medical malpractice; and to provide for related matters".

Acts 1986, No. 965, § 1, in par. A(1) made the definition applicable to health care providers and substituted "or" for "of" preceding "any discipline listed herein" (and changed back to "of" on authority of R.S. 24:253); in par. A(7) in the first sentence, substituted ", including" for "and includes" and inserted ", to which the injured patient is entitled under the provisions of this Section and which each injured patient needs after the date of the filing of his judicial demand", and in the second sentence, substituted "or" for "of" following "specialty items or devices" (and changed back to "of" on authority of R.S. 24:253); and in subsec. D, inserted the sentence relating to review of claims by a state medical review panel, and in the last sentence, deleted 'Provided further that" from the beginning of the sentence, substituted "may" for

APPENDIX B

§ 1299.43. Future medical care and related benefits

A. (1) In all malpractice claims filed with the commissioner of insurance which proceed to trial, the jury shall be given a special interrogatory asking if the patient is in need of future medical care and related benefits and the amount thereof.

(2) In actions upon malpractice claims tried by the court, the court's finding shall include a recitation that the patient is or is not in need of future medical care and related benefits and the amount thereof.

(3) If the total amount is for the maximum amount recoverable, exclusive of the value of future medical care and related benefits, the cost of all future medical care and related benefits shall be paid in accordance with this Section.

(4) If the total amount is for the maximum amount recoverable, including the value of the future medical care and related benefits, the amount of future medical care and related benefits shall be deducted from the total amount and shall be paid from the patient's compensation fund as incurred and presented for payment. The remaining portion of the judgment shall be paid in accordance with R. S. 40:1299.44(A)(7) and 40:1299.44(B)(1), (B)(2) and (B)(3).

(5) In all cases where judgment is rendered for a total amount less than the maximum amount recoverable, including any amount awarded on future medical care and related benefits, payment shall be in accordance with R.S. 40:1299.44(A)(7) and 40:1299.44(B)(1), (B)(2), and (B)(3).

The provisions of this Subsection shall be applicable to all malpractice claims filed on or after September 1, 1984.

B. (1) "Future medical care and related benefits" for the purpose of this Section means all reasonable medical, surgical, hospitalization, physical rehabilitation, and custodial services and includes drugs, prosthetic devices, and other similar materials reasonably necessary in the provision of such services.

(2) "Future medical care and benefits" as used in this Section shall not be construed to mean non-essential specialty items or devices of convenience.

C. Once a judgment is entered in favor of a patient who is found to be in need of future medical care and related benefits or a settlement is reached between a patient and the patient's compensation fund in which the provision of medical care and related benefits is agreed upon and continuing as long as medical or surgical attention is reasonably necessary, the patient may make a claim to the patient's compensation fund through the office of the attorney general for all future medical care and related benefits directly or indirectly made necessary by the health care provider's malpractice unless the patient refuses to allow them to be furnished.

D. Payments for medical care and related benefits shall be paid by the patient's compensation fund without regard to the five hundred thousand dollar limitation imposed in R.S. 40:1299.42.

E. (1) The district court from which final judgment issues shall have continuing jurisdiction in cases where medical care and related benefits are determined to be needed by the patient.

(2) The court shall award reasonable attorney fees to the claimant's attorney if the court finds that the patient's compensation fund unreasonably fails to pay for medical care within thirty days after submission of a claim for payment of such benefits.

F. Nothing in this Section shall be construed to prevent a patient and a helath care provider and/or the patient's compensation fund from entering into a court-approved settlement agreement whereby medical care and related benefits shall be provided for a limited period of time only or to a limited degree.

G. The patient's compensation fund shall be entitled to have a physical examination of the patient by a physician of the patient's compensation fund's choice from time to time for the purpose of determining the patient's continued need of future medical care and related benefits, subject to the following requirements:

(1)(a) Notice in writing shall be delivered to or served upon the patient or the patient's counsel of record, specifying the time and place where it is intended to conduct the examination.

(b) Such notice must be given at least ten days prior to the time stated in the notice.

(c) Delivery of the notice may be by certified mail.

(2) Such examination shall be by a licensed medical physican or chiropractic physician licensed under the laws of this state or of the state, parish, or county wherein the patient resides.

(3)(a) The place at which such examination is to be

conducted shall not involve an unreasonable amount of travel for the patient considering all circumstances.

(b) It shall not be necessary for a patient who resides outside this state to come into this state for such an examination unless so ordered by the court.

(4) Within thirty days after the examination, the patient shall be compensated by the party requesting the examination for all necesary and reasonable expenses incidental to submitting to the examination including the reasonable costs of travel, meals, lodging, loss of pay, or other direct expenses.

(5)(a) Examinations may not be required more frequently than at six months intervals except that, upon application to the court having jurisdiction of the claim and after reasonable cause shown therefor, examination within a shorter interval may be ordered.

(b) In considering such application, the court should exercise care to prevent harassmenat to the patient.

(6)(a) The patient shall be entitled to have a physician or an attorney of his own choice or both present at such examination.

(b) The patient shall pay such physician or attorney himself.

(7) The patient shall be promptly furnished with a copy of the report of the examination made by the physician making the examination on behalf of the patient's compensation fund.

H. If a patient fails or refuses to submit to examina-

tion in accordance with a notice and if the requirements of Subsection G of this Section have been satisfied, then the patient shall not be entitled to attorney fees in any action to enforce rights pursuant to Subsection E of this Section.

I. (1) Any physician selected by the patient's compensation fund and paid by the patient's compensation fund who shall make or be present at an examination of the patient conducted in pursuance of this Section may be required to testify as to the conduct thereof and the findings made.

(2) Communications made by the patient upon such examination by such physician or physicians shall not be considered privileged.

J. The patient's compensation fund shall pay all reasonable fees and costs of medical examinations and the costs and the fees of the medical expert witnesses in any proceeding in which the termination of medical care and related benefits is sought.

Added by Acts 1984, No. 435, § 3, eff. July 6, 1984.

The paragraph designations in subsecs. A, B, E, and I, and the subparagraph designations in subsec. G of this section as enacted in 1984 were made on authority of R.S. 24.253; and, on the same authority, in par. A(4), near the beginning of the first sentence, following "masimum amount recoverable", the comma was inserted; and, at the beginning of par. B(2), quotation marks enclosing "Future medical care and benefits" were inserted.

APPENDIX C

CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 83-10059 DIVISION "E" DOCKET #4

LYN BEAUCOUDRAY wife of/and EDWARD KELTY, JR.
individually and on behalf of their minor child,
ANN MARY KELTY

VERSUS

FRED BRUMFIELD, M.D., and
SOUTHERN BAPTIST HOSPITAL

JUDGMENT

For written reasons assigned, the exception of prescription is overruled.

Judgment is rendered declaring that damages exceed the sum of $500,000.00, plus interest from the date the claim was filed, and costs, including an expert fee for Dr. Brochin set at $750.00.

JUDGMENT READ, RENDERED and SIGNED this 17th day of November, 1987.

Gerald P. Federoff

J U D G E

APPENDIX D

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 83-10059 DIVISION "E" DOCKET #4

LYN BEAUCOUDRAY wife of/and EDWARD KELTY, JR.. individually and on behalf of their minor child, ANN MARY KELTY

VERSUS

FRED BRUMFIELD, M.D., and SOUTHERN BAPTIST HOSPITAL

SUPPLEMENTAL REASONS FOR JUDGMENT

On motion of plaintiff, this case was inadvertantly reset for trial on January 4, 1988. It was plaintiff's intent to establish the necessity and amount of future medical expense. I declined to hear the case believing that the judgment of November 17, 1987 was intended and in fact did dispose of the entire claim. I felt then that the 1984 amendment allowing for future medical in excess of the $500,000.00 was not applicable to this case. I therefore intended to rule that plaintiff could recover no more than the sum awarded at that time.

I may have been wrong. But time for a new trial has expired, and plaintiff's only remedy is to answer the Fund's appeal.

Once again, the problem presented demonstrates the inartfulness of the statute. As indicated, the amendment

allows for unlimited "future" medical, whatever that means. But Section 6 provides that this subsection shall be applied to all malpractice claims filed on or after September, 1984.

It is extremely difficult to justify a substantial variation in the amount recoverable depending on when a claim therefor is filed. But more pertinently, our problem is to determine when this claim was filed. Was it when the plaintiff requested a "review" of the claim, which occurred before September 1, 1984 or was it filed when this suit was filed, which occurred after September 1, 1984?

Frankly I did not preceive this distinction on November 17, 1987 and assummed without analysis that the amendment did not apply to this case. Though there has not been proof yet introduced on the need or amount of future medical care, this poor child's condition will obviously require a huge amount of money to care for her.

NEW ORLEANS, LOUISIANA, this 11th day of January, 1988.

/s/ Gerald P. Federoff

J U D G E

APPENDIX E

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 83-10059 DIVISION "E" DOCKET CLERK -5
FILED— JAN 20 '83

LYNN BEAUCOUDRAY, wife of/and
JAMES EDWARD KELTY, JR.
Individually and on Behalf of Their Minor Child,
ANN MARY KELTY

VERSUS

FRED O. BRUMFIELD, MD. and
SOUTHERN BAPTIST HOSPITAL

FILED: _____ _____
DEPUTY CLERK

ANSWER TO SUSPENSIVE APPEAL

NOW INTO COURT, through undersigned counsel, comes Lynn Beaucoudray, wife of/and James Edward Kelty, Jr., Individually and on Behalf of Their Minor Child, Ann Mary Kelty, who wish to answer the Suspensive Appeal filed by the Louisiana Patient's Compensation Fund, et al, in the following manner:

1.

The Trial Court was in error in not allowing the plaintiffs to proceed to trial before a jury to determine damages, as requested in plaintiffs' PETITION FOR DAMAGES.

2

The Trial Court was in error in not allowing the plaintiffs to proceed to trial before a jury to determine future medicals, as requested in plaintiffs' PETITION FOR DAMAGES.

3

The Trial Court was in error in not allowing the plaintiffs to proceed to trial to test the constitutionality of L.S.A. R.S. 40:1299.42.

4

The Trial Court was in error by not finding that Dr. Brumfield's actions mislead the plaintiffs and therefore interrupted prescription.

WHEREFORE, Lynn Beaucoudray, wife of/and James Edward Kelty, Jr., individually and on behalf of their minor child, Ann Mary Kelty, pray that they be allowed to answer this Appeal, in the manner hereinabove set forth.

Respectfully submitted,

/s/ Kenneth V. Ward, Jr.

KENNETH V. WARD, JR.
Attorney for Plaintiffs
2607 Harvard Avenue
Metairie, Louisiana 70001
454-5906

ORDER

Considering the foregoing, that the plaintiffs, Lynn Beaucoudray, wife of/and James Edward Kelty, Jr., Individually and on Behalf of Their Minor Child, Ann Mary Kelty, be allowed to answer the Suspensive Appeal, as prayed for.

New Orleans, Louisiana, this ____ day of _____, 1988.

_____

JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing ANSWER TO SUSPENSIVE APPEAL has been mailed this 20th day of January, 1988, to all counsel of record by placing a copy in the United States Mail, postage prepaid.

/s/ Kenneth V. Ward, Jr.

KENNETH V. WARD, JR.

APPENDIX F

Lynn Beaucoudray, wife of/and James Edward Kelty, Jr., individually and on Behalf of their minor child, Ann Mary Kelty

v.

Dr. Fred O. BRUMFIELD, M.D. and Southern Baptist Hospital, et al.

No. 88-CA-0592.

Court of Appeal of Louisiana, Fourth Circuit.

Nov. 10, 1988.

Writ Denied Jan. 13, 1989.

In medical malpractice action arising from alleged negligent delivery of infant, physician and hospital settled and were dismissed, and Patient Compensation Fund urged prescription. The Civil District Court, Parish of Orleans, Gerald P. Fedoroff, J., rendered judgment that Fund lacked standing to raise prescription issue and held that plaintiff was not entitled to trial on issue of future medical expenses. On appeal, the Court of Appeal, Lobrano, J., held that: (1) upon settlement for statutory maximum liability in medical malpractice action, Patient Compensation Fund did not have standing to assert defense of prescription, and (2) "claim is filed" for purposes of statute providing that Medical Malpractice Act is applicable to all claims filed after September 1, 1984, when plaintiff files request for medical review, rather than when suit is instituted.

Affirmed.

Kenneth V. Ward, Jr., Metairie, for appellees.

William R. Carruth, Jr., Ambrose K. Ramsey, III, Carruth, Cooper and Adams, Baton Rouge, for appellants.

Before SCHOTT and LOBRANO, JJ., and HUFFT, J. Pro Tem.

LOBRANO, Judge.

This case of medical malpractice was first filed by James and Lynn Kelty, individually and on behalf of their minor child Ann Mary Kelty, by requesting the formation of a medical review panel on April 22, 1983. Plaintiffs alleged that the defendants, Fred O. Brumfield, M.D. and Southern Baptist Hospital were negligent in the delivery of Ann Mary Kelty which caused severe brain damage to the infant.

Before the review panel was convened, Dr. Brumfield filed an exception claiming that the Kelty's claim had prescribed. On February 13, 1985, the exception was overruled by the trial court. On June 25, 1985, the review panel rendered its decision.

On August 23, 1985, the Kelty's filed this petition in district court. During the course of this litigation the defend-
ants reurged the exception of prescription. The trial court referred the exception to the merits of the case. This court deanied defendants' writ application.

On April 29, 1987, the Kelty's settled their claim with Southern Baptist Hospital for $75,000.00. On November 2, 1987, the morning of the scheduled trial, the Kelty's reported that they had settled their claim on

October 31, 1987 with Dr. Brumfield for $100,000.00, reserving their right to obtin excess damages from the Louisiana Patient's Compensation Fund (hereinafter the Fund). Both health care provides were dismissed from the suit. Nevertheless, on November 2, 3 and 6, 1987 the trial court heard the prescription exception previously filed by those health care providers, then urged by the Fund. The Fund did not actually file an exception until the hearing had commenced. During the course of the hearing the Fund also stipulated that damages would be in excess of $500,000.00.

On November 17, 1987 the trial court denied the exception on the basis that the Fund did not have standing to raise prescription once the health care provider admitted liability by settling for the maximum statutory limits. Although the court's reasons for judgment suggest that prescription had in fact run, the basis of the judgment is clearly the Fund's lack of standing to raise the issue.

A supplemental judgment was rendered on January 17, 1988 holding that palintiff was not entitled to a trial on the issue of future medical expenses. That judgment was based on the fact that plaintiffs' claims were asserted prior to September 14, 1984, the effective date of Act 435 of 1984. The trial court awarded plaintiffs damages in the amount of $500,000.00, subject to a credit of $200,000.00.

The Fund appeals asserting that the trial court erred in holding that it does not have standing to raise prescription.

The plaintiffs answer the appeal arguing they are entitled to future medical benefits, as well as a trial on the issue of damages since they intend to contrest the constitutionality of the $500,000.00 limitation.

Thus the issues for our determination are:

(1) Does the Fund have the right to urge the defense of prescription once the health care provides settled for their maximum liability?

(2) Are the plaintiffs entitled to future medical benefits?

(3) Are the plaintiffs entitled to a trial to determine the total amount of damages?

The Fund's Standing

[1,2] The Fund bases its argument that it has the right to assert the defense of prescription on Civil Code Article 3453.
That article provides:

> "Creditors and other persons having an interest in the acquisition of a thing or in the extinction of a claim or a real right by prescription may plead prescription. even if the person in whose favor prescription has accured renounces or gails to plead prescription."

For the following reasons we reject the Fund's argument and affirm the trial court.

La.R.S. 40:1299.44(C)(5) provides, in pertinent part:

> "In approving a settlement or determining the amount, if any, to be paid from the patient's compensation fund, *the court shall consider the liability of the health care provider as admitted and established* where the insurer has paid its policy limits of one hundred thousand dollars, or where the self-ensured health care provider has paid one hundred thousand dollars.;; (emphasis added)

The Medical Malpractice Act does not contemplate the Fund as a party defendant. *Williams v. Kushner,* 449 So.2d 455 (La. 1984). The Fund is a "budget unit" of the State. *La.R.S. 40:1299.44(A)(5)(g).* The functions of administering the Fund are carried out by the commissioner of insurance. *La.R.S. 40:1299(A)(5)(b).* The act does not give the Fund status as a co-obligor or insurer of the health care provider. Ii is a creature of the legislature designed to satisfy settlements and/or judgments against health care providers in excess of $100,000.00. The Fund does not have to be made a party to the litigation, nor cast in judgment in order to disburse its funds. The only requirement is a final judgment or a court approved settlement, or a final arbitration award, against the health care provider in excess of one hundred thousand dollars. *La.R.S. 40:1299.44(B)(2)(a-c).* See also, *Forstall v. Hotel Dieu Hospital,* 429 SO.2d 213 (La.App. 4th Cir.1983), writ denied 433 So.2d 1054.

In *Felix v. St. paul Fire and Marine Ins. Co.,* 477 So.2d 676 (La.1985), the Supreme Court defined the Fund as a statutory intervenor "who has an interest in the proceedings between the claimant and the health care provider because any damages in excess of one hundred thousand dollars are payable by the Fund." *Id. at 680, 681.* Our interpretation of the Act makes it clear that the only issue confronting the fund once a maximum settlement has been reached with the health care provider is the amount of damages. *La.R.S. 40:1299.-44(C).* If the settlement is less than the maximum one hundred thousand dollars, the plaintiff must still prove liability if he seeks damages in excess of the maximum. However, where the settlement is for the maximum amount, the statute is clear that *liability* is admitted.[1]

Thus the Fund is limited by the provisions of the Medical Malpractice Act, the act which created it. We are

of the opinion that the legislature did not intend to give the Fund equal status as a party defendant once the health care provider settled for its maximum liability. In those instances, the legislature reserved to the Fund only the right to contest the amount of damages and nothing more. We therefore conclude, under the factual scenario of this case, that the Fund was not given the status of "creditor or other person" within the meaning of Civil Code Article 3453. It does not have the right to invoke the provisions of that article, nor does it have the right to question, for any other reason, the health provider's statutorily admitted liability.

Future Medical Benefits

[3] Plaintiffs have answered this appeal asserting they are entitled to a trial on the issue of future medical benefits.

Act 435 of 1984 provided for the payment of future medical care and related benefits in excess of the statutory limitation of five hundred thousand dollars. *La.R.S. 40:1299.43.* However, subsection (A)(6) provided that the Act would be applicable to all claims filed on or after September 1, 1984. In the instant case, plaintiffs filed their claim seeking a medical review panel on April 22, 1983. However, suit was filed in Civil District Court on August 23, 1985.

Plaintiffs argue their "claim" was filed when suit was instituted, not when they requested the medical review panel. In support, thereof, plaintiffs contend that since the panel cannot award damages, but only render an expert opinion, their claim was not filed within the meaning of the act. We disagree.

A prerequisite to the assertion of all malpractice claims against health care providers who are covered by the Medical Malpractice Act is review by a medical review panel. *La.R.S. 40:1299.47(A)(1).* The filing for a medical review panel suspends prescription. *La.R.S. 40:1299.47(A)(2)(a).* No action may be commenced in any court unless a claimant has presented his claim before a review panel. *La.R.S. 40.1299.47(B)(1)(a)(i).* And, legal interest on any judgment accrues from the date of filing for a review panel. *La.R.S. 40:1299.47(M).*

We are satisfied that a "claim is filed" when a plaintiff files a request for a medical review under the provision of La.R.S. 40:1299.47. In order to pursue his claim under the malpractice act, he must comply with those provisions. And when he does so it begins the procedural mechanism which ultimately will resolve the matter. It constitutes the "filing of his claim" within the meaning of La.R.S. 40:1299.43(A)(6). We therefore agree that plaintiff is not entitled to future medical expenses.

Alternatively, plaintiffs argue that the statute is remedial in nature and therefore should apply to all pending claims. In our opinion this statute is substantive in that it creates a right or obligation and therefore can have no retroactive application. However, even if it be considered procedural or remedial, the language of the act expresses a legislative intent for prospective application only. *La.C.C. Art. 6; Graham v. Sequoya Corporation,* 478 So.2d 1223 (La. 1985).

Constitutionality of the Medical Malpractice Act

[4] Plaintiffs argue that they should be allowed to proceed with a trial on the damage issue because they intend to contest the constitutionality of the five hundred

thousand dollar limitation. This Court, in *Williams v. Kushner,* 524 So.2d 191 (La. App. 4th Cir. 1988), writs granted 526 So.2d 785, has upheld the constitutionality of the statutory limitation. The Supreme Court has granted writs to consider this issue, but as of the date of this opinion no judgment has been rendered. Therefore, at this time, plaintiffs have no right to proceed further. However, should the *Williams* case be reversed, we reserve to plaintiffs the right to proceed to trial on the issue of quantum.

AFFIRMED.

APPENDIX G

SUPREME COURT OF LOUISIANA

NO._____

88 C 2985

****

88-C-2952

LYNN BEAUCOUDRAY, WIFE OF/AND
JAMES EDWARD KELTY, JR., INDIVIDUALLY AND
ON BEHALF OF THEIR MINOR CHILD,
ANN MARY KELTY

VERSUS

FRED BRUMFIELD, M.D., AND
SOUTHERN BAPTIST HOSPITAL

****

ORIGINAL APPLICATION FOR WRIT OF
CERTIORARI OR REVIEW, TO REVIEW
THE DECISION OF THE COURT OF
APPEAL, FOURTH CIRCUIT, STATE
OF LOUISIANA

****

KENNETH V. WARD, JR.
2607 Harvard Avenue
Metairie, La. 70001
(504) 454-5906

BY: /s/ Kenneth V. Ward, Jr.
KENNETH V. WARD, JR.
COUNSEL FOR LYNN BEAUCOUR-
DRAY, WIFE OF EDWARD KELTY,
JR., INDIVIDUALLY AND ON
Dec 12 88 BEHALF OF THEIR MINOR CHILD,
ANN MARY KELTY
Plaintiffs/Appellants

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FUTURE MEDICAL EXPENSES, COMPUTATIONS,

BERNARD F. PETTINGILL, JR. PH.D 39

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF LOUISIANA

The application of Lynn Beaucoudray, wife of/and James Edward Kelty, Jr., individually and on behalf of their minor child, Ann Mary Kelty, plaintiffs, appellee/applicants, Lynn Beaucoudray, wife of/and James Edward Kelty, Jr., individually and on behalf of their minor child, Ann Mary Kelty, seeking Writs of Certiorari or Review from the opinion of the Fourth Circuit Court of Appeal for the State of Louisiana, No. 88-CA-0592 respectfully shows:

STATEMENT OF THE CASE

Lynn Beaucoudray Kelty, plaintiff and applicant herein, was a patient of Fred Brumfield, M.D., an obstetrician and qualified health care provider in 1978. Mrs. Kelty was due to deliver her second child on July 19, 1978 and, in compliance with the orders of her obstetrician, admitted herself into Southern Baptist Hospital on July 18, 1978. It has been established that Dr. Fred Brumfield acted below the standard of care by using a contraindicated drug, Pitocin, in inducing the labor of Mrs. Kelty. The results of the injudicious use of this drug, and the failure to monitor Mrs. Kelty during the course of administration of this drug, led to the birth of a severely retarded and brain damaged child, Ann Mary Kelty. The plaintiffs filed a Petition For Damages alleging that the actions and/or inactions of Dr. Brumfield and the nursing staff of Southern Baptist Hospital were below the standard of care. Both Baptist Hospital and Dr. Brumfield settled with the plaintiffs prior to the day this matter was set to be heard on the merits in Civil District Court. After Southern Baptist Hospital and Dr. Brumfield settled their claims with the plaintiffs, and were dismissed as parties defendant from the litigation, the Louisiana Patients Compensation Fund

filed an Exception of Prescription. The Exception of Prescription was overruled by the Honorable Gerald P. Fedoroff, and this Judgment was affirmed on November 10, 1988 by the Fourth Circuit Court of Appeals for the State of Louisiana. For a more detailed background of this extensive litigation, please see *Applicants Statement of The Case* as set forth in their original brief to the Fourth Circuit, attached hereto.

Plaintiffs answered the appeal of the Louisiana Compensation Fund asserting that it was entitled to future medical benefits. The Court of Appeals determined that plaintiffs were not entitled to future medical expenses.

ISSUE PRESENTED

WHETHER APPLICANTS ARE ENTITLED TO FUTURE MEDICAL BENEFITS FOR THE CARE OF ANN MARY KELTY

ASSIGNMENT OF ERRORS

The Court of Appeal erred in finding that the plaintiffs are not entitled to future medical benefits.

ARGUMENT

The Court of Appeal erred in finding that the plaintiffs/applicants were not entitled to future medical benefits. In the plaintiffs' original Petition For Damages, filed in the Civil District Court for the Parish of Orleans, they demanded damages which included the payment of all future medical expenses. The Honorable Gerald P. Fedoroff, in his *Supplemental Reasons For Judgment*, felt that he did not believe that Act 435 of the 1984 legislature pertaining to the payment of future medicals, *LA. R.S.*

40:1299.43 A(6). was applicable to the plaintiffs claim due to the fact that that Act provided that future medical expenses would be paid for all *claims* filed on or after September 1, 1984. Plaintiffs made the distinction and, reassert same, that their filing of a request for Medical Review Panel on April 22, 1983 was not the filing of a claim, as required by this statute, but the filing of their Petition For Damages on August 23, 1985 was when the plaintiffs actually filed their claim.

> The Fourth Circuit Court of Appeals, when addressing this issue, stated:
>
> "We are satisfied that a "claim is filed" when a plaintiff files a request for a medical review under the provision of LA. R.S. 40:1299.47. In order to pursue his claim under the malpractice act, he must comply with those provisions. And when he does so it begins the procedural mechanism which ultimately will resolve the matter. It constitutes the "filing of his claim" within the meaning of LA. R.S. 40:1299.43(A) (6). We therefore agree that plaintiff is not entitled to future medical expenses."

LA. R.S. 40:299.41 deals with the general law of the Medical Malpractice and LA. R.S. 40:1299.43 deals with future medical care and related benefits to those victims of medical negligence by health care providers not providing health care services by or on behalf of the State of Louisiana.

LA. R.S. 40:1299.43 (6), when addressing the applicability of future medical services states:

"The provisions of this Subsection shall be applicable to all malpractice claims filed on or after September 1, 1984."

LA. R.S. 40:1299.39 provides a similar guideline of medical malpractice laws to follow when dealing with medical negligence provided by a health care provider acting by or on behalf of the State of Louisiana. LA. R.S. 40:1299.39, as amended by Act 1985, No. 239 Section 2 provides that:

> "The provisions of this Act (future medical benefits) shall apply to pending litigation and pending claims made pursuant to LA. R.S. 40:1299.39."

Was it the interest of the legislature to provide different remedies to victims of medical malpractice based upon whether or not the health care provider was a *private* health care provider or a health care provider acting by on or behalf of the State of Louisiana? This is the issue to be decided by this Court if it does grant this application for writs.

Was it the intention of the legislature to view the results of medical negligence depending upon whom the employer of the health care provider was? Or was it the true legislative intent to have similar laws on the issue of malpractice for private privately employed physicians and State employed physicians.?

Was it the intention of the legislature to limit the amount of damages recoverable to any successful litigant in a malpractice case to $500,000.00, without distinction as to the statuts of the employer of the health care provider but, on the other hand, to disallow future medical benefits to the same litigant if the health care provider was employed by the State?

CONCLUSION

Louisiana Civil Code Article 18 states:

> "The universal and most effectual way of discovering the true meaning of the law, when its expressions are dubious, is by considereing the reason and spirit of it, or the cause which induced the Legislature to enact it."

The trial court, when presented with the question as to whether or not the plaintiffs/applicants were entitled to future medical benefits, stated:

> "It is extremely dificult to justify a substantial variation in the amount recoverable depending upon when a claim therefore is filed. . ."

The Fourth Circuit decided that a claim was filed when the plaintiffs requested a review of their claim before the medical review panel.

It is submitted that the plaintiffs' claim, i.e., their Petition For Damages, was filed after the September 1, 1984 amendment and, therefore, future medical benefits should be allowed.

Alternatively, it is urged that this Court consider the applicability of future medical benefits of LA. R.S. 40:1299.43(6) in line with the reasoning and substance of LA. R.S. 40:1299.39 as amended by Act 1985, No. 239, Section 2 as it pertains to state related actions.

Respectfully submitted

/s/ Kenneth V. Ward, Jr.
KENNETH V. WARD, JR.
2607 Harvard Avenue
Metairie, La. 70001
(504) 454-5906
Attorney for Lynn
Beaucoudray, wife of
James Edward Kelty, Jr.

VERIFICATION

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned Notary Public, personally came and appeared Kenneth V. Ward, Jr. who, after being duly sworn, deposed and stated that he is counsel of record for Lynn Beaucoudray, wife of/and James Edward Kelty, Jr., individually and on behalf of their minor child, Ann Mary Kelty, and that all allegations in the foregoing application for Writ of Certiorari or Review are true and correct to the best of his knowledge and, furthermore, that a copy of this application has been duly served upon all counsel of record this 12th day of December, 1988 by placing a copy of same, properly addressed, and postage prepaid into the United States Mail.

/s/ Kenneth V. Ward, Jr.
KENNETH V. WARD, JR.

SWORN TO AND SUBSCRIBED before me this 17th day of December, 1988

/s/ Illegible
NOTARY PUBLIC

APPENDIX H

The Supreme Court of the State of Louisiana

LYNN BEAUCOUDRAY, WIFE/AND JAMES EDWARD KELTY, JR., INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILD, ANN MARY KELTY

VS. NO. 88-C - 2985

DR. FRED O. BRUMFIELD, M.D. AND SOUTHERN BAPTIST HOSPITAL ET AL

— — — — —

IN RE: Beaucoudray, Lynn; Kelty, James Edward Jr., - Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, Number 88CA-0592; Parish of Orleans Civil District Court Div. "E" Number 83-10059

— — — — —

January 13, 1989

Denied.

LFC
PFC
WFM
JLD
JCW
HTL

Supreme Court of Louisiana
January 13, 1989

/s/ Illegible

Clerk of Court
For the Court

APPENDIX I

Prince A. Williams

v.

Jack KUSHNER, et al.

Nos. 88-C-1153, 88-C-1188.

Supreme Court of Louisiana.

Sept. 23, 1989.

Concurring Opinion by Justice Calogero Sept. 22, 1989.

Rehearing Denied Oct. 19, 1989.

Father brought suit against physician and hospital to recover damages for permanent injuries sustained by his son at birth. Physician settled with father prior to trial for $100,000. The Civil District Court, Parish of Orleans, Steven R. Plotkin, J., denied Commissioner of Insurance's motion to strike demand for jury trial, and appeal was taken. The Supreme Court, 449 So.2d 455, vacated in part, affirmed in part and remanded. Jury found damages totaling $1,829,000 and the fund asserted $500,000 limitation. The Civil District Court, Parish of Orleans, Frederick S. Ellis, J. ad hoc, granted motion, and appeal was taken. The Court of Appeal, Ward, J. 524 So.2d 191, affirmed, and writs were granted to review the decision, 526 So.2d 785. The Supreme Court held that: (1) there was no constitutional infirmity in state's providing for payment of $400,000 in damages from patient's compensation fund; (2) disparity in language between statute excluding cost of

future medical care and related benefits from $500,000 limitation on recovery in private sector claims and similar statutory exception made with regard to malpractice claims against the state violated claimant's constitutional guaranty of equal protection.

Amended and affirmed.

Lemmon, J., concurred.

Cole, J., additionally concurred to join with reasons assigned by Lemmon, J.

Calogero, J., additionally concurred and assigned reasons.

Marcus, J., concurred in part and dissented in part and assigned reasons.

Dixon, D.J., and Dennis, J., dissented and assigned reasons.

Joseph Thomas, Angelique Reed, Ammon Miller, Jr., New Orleans, for Prince A. Williams.

Stephen Sullivan, New Orleans, Rene Pastorek, Gretna, for La. Patient's Compensation Fund and Sherman Bernard.

Sam LeBlanc, III, Robert Conrad, Jr., Richard Goins, Adams & Reese, New Orleans, for Louisiana State Medical Soc. and Louisiana Medical Mut. Ins. Co.

Carter G. Phillips, David Orentlicher, Sidley & Austin, Sam A. LeBlanc, III, Robert J. Conrad, Jr., Richard A. Goins, Adams & Reese, New Orleans, Kirk B.

Johnson, Martin J. Hatlie, amicus curiae, for the American Medical Ass'n.

David W. Robertson, Baton Rouge, amicus curiae, for The Ass'n of Trial Lawyers of America and The Louisiana Trial Lawyers Ass'n.

S. Sanford Levy, New Orleans, amicus curiae, for S. Sanford Levy.

Robert L. Roland, Felix R. Weill, Katherine Long Gilmore, Baton Rouge, amicus curiae, for The Louisiana Hosp. Ass'n and Louisiana Hosp. Ass'n Ins. Trust.

Herbert J. Mang, Jr., Glen Scott Love, Mathews, Atkinson, Guglielmo, Marks & Day, Baton Rouge, amicus curiae, for the Louisiana Dental Ass'n.

Allan Berger, Berger & Forstall, James A. Wysocki, Stephanie Hrachovy, New Orleans, Attys. filing amicus curiae.

A writ was granted principally to consider the constitutionality of the $500,000 "cap" on recovery for a person injured by medical malpractice. On closer analysis following briefing and argument, it has become apparent that the recovery limitation is not presented in the context originally thought. A more careful study has revealed that there are three issues in these proceedings, one of which is moot.

The three issues are as follows:

(1) The constitutionality of the $400,000 limitation on recovery from the Patient's Compensation Fund.[1]

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[1] LSA-R.S. 40:1299.42.

(2) The constitutionality of the $100,000 limitation on recovery against a qualified health care provider.[2]

(3) The constitutionality of denying the costs of future medical care and related benefits to a patient injured in a private facility and filing a claim prior to September 2, 1984.[3]

This opinion decides the first and third issue, but for reasons discussed below, the second issue is not before the court.

Suit was filed in January, 1983 by Prince A. Williams to recover damages for permanent injuries sustained by his son, Mark Williams, at his birth in a private hospital. The attending doctor, Dr. Jack Kushner, settled with plaintiff prior to trial for $100,000.[4] Plaintiff was given a jury trial[5] on quantum, and there was an unitemized verdict for $1,829,000.

After a *Sibley* hearing,[6] the trial court reduced the damages to the statutory limit of $400,000 plus legal interest and costs. The court of appeal affirmed the judgment

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[2] LSA-R.S. 40:1299.42(B)(2).

[3] Act No. 435 of 1984; LSA-R.S. 40:1299.43.

[4] The doctor was released together with all "related companies and/or parties and employees. . . ." The language apparently referred to Dr. Herman R. Cohen, with whom Dr.Kushner operated "A Professional Medical Corporation." Dr. Cohen and the corporation were not included in the later proceedings.

[5] *Williams on Behalf of Williams v. Kushner*, 449 So.2d 455 (La.1984).

[6] *Sibley v. Board of Sup'rs of Louisiana State University*, 477 So.2d 1094 (La.1985). Kushner operated "A Professional Medical Corporation."

of the trial court.[7] Writs were granted to review the decision.[8]

The record supports the jury's award of damages in excess of $500,000. Mark Williams has a useless right arm. He was diagnosed as having Erb's palsy and Klumke's palsy. It was stipulated that the injujry occurred at birth and that the damage is permanent. Because of balance problems, Mark's physical activity is restricted: he has a poor self image and little self confidence. At every stage of his development, and particularly during adolescence, he will suffer from his handicap. He will never be able to engage in any activity requiring two hands or two arms. Discounted to present value, his future loss of earnings was estimated at $193,736. There was testimony that both Mark and his parents will need extensive psychological counseling to enable them to cope with his handicap.

The Louisiana statutory scheme places a $100,000 maximum on the health care provider's liability and provides a $400,000 supplemental amount available to each injured person, payable from the state operated Patient's Compensation Fund, thus limiting recovery to a total of $500,000. Plaintiff's suit attacks the total, claiming that the PCF should be cast for the entire amount (less $100,000) awarded by the jury.

I. Recovery Against the Patient's Compensation Fund

[1] For damages other than future medical care and related benefits, the $400,000 limitation on recovery from the Patient's Compensation Fund is a valid restriction. As

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[7] *Williams v. Kushner*, 524 So.2d 191 (La.App. 4th Cir.1988).

[8] 526 So.2d 785 (La.1988).

the Supreme Court of Kansas observed:

> "Because the Fund is a state-run insurance company, the State is free to limit its liability in any amount it wishes. The issue presented here is one of limiting *the liability of a tortfeasor,* namely the negligent health care provider." *Kansas Malpractice Victims v. Bell,* 243 Kan. 333, 757 P.2d 251, 256 (1988) (emphasis added).[9]

The legislature had the power to establish the fund and provide a supplemental recovery for those more seriously injured by medical malpractice. This affirmative act is not subject to the *Sibley* constitutional analysis. The fund is not a negligent party and does not have the status of an Article 2315 defendant.

Thus, there is no constitutional infirmity in the state's providing for payment of $400,000 in damages to plaintiff on behalf of his minor son, and plaintiff has no constitutional claim for a greater amount. See *Prendergast v. Nelson,* 199 Neb. 97, 256 N.W.2d 657 (1977).

II. Recovery Against the Health Care Provider.

In view of the conclusion reached on the first issue, it is apparent that the fundamental question involved is: what about the statutory limit of $100,000 damages payable by the doctor? This is indeed a vexing and difficult issue, as witness the disparatge results reached in other states. To illustrate, *Fein v. Permanente Medical Group,* 38 Cal.3d 137, 211 Cal.Rptr. 368, 695 P.2d 665 (1985), upheld a $250,000 California limit on noneconomic damages; while *Smith v. Department of Ins.* 507 So.2d 1080 (Fla.1987) declared a Florida statute placing a $450,000 cap on

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[9] See also *Prendergast v. Nelson,* 199 Neb. 97, 256 N.W.2d 657 (1977).

noneconomic losses unconstitutional. For a more or less complete summary of treatment by the various states, see Appendix II.

Rephrased the issue here would be: Can the State of Louisiana limit a health care provider's liability to a maximum of $100,000 in a general scheme governing recovery for medical malpractice, which includes a limitation on total recovery of $500,000, without violating the equal protection and adequate remedy clauses of the Louisiana Constitution?

The answer must await another day; the issue is not before the court. Dr. Jack Kushner, the treating physician, was released from the suit prior to trial. Because of the settlement with Dr. Kushner, the health care provider, his liability is a moot question.

III. Future Medical Care and Related Benefits

While the third issue was not assigned as error in the precise language used here, the issue is implicit in the arguments urged by relator. Treatment of the question of medical benefits is appropriate at this time.

[2] In 1984, Act 435 enacted LSA-R.S. 40:1299.43 to provide that the cost of "future medical care and related benefits" is excluded from the $500,000 limitation on recovery in private sector claims. In 1985, the same exception was made with regard to malpractice claims against the state.[10] However, the 1984 private sector act applies only to malpractice claims filed "on or after September 1,

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10 Act 239 of 1985: LSA-R.S. 40:1299.39.

1984", and would exclude the present claim. The 1985 act applies to "pending claims and litigation." Thus, if Mark Williams had been injured at birth in a state facility under the care of a state employee, his future medical expenses could be recovered. Because he was born in a private hospital under the care of a private physician, these expenses are legislatively placed in a different category. This anomaly is a clear violation of the Louisiana constitutional guarantee of equal protection.[11]

Despite wording to the contrary, Act 435 of 1984 must be reformed to apply to claims and litigation pending when it was passed. Plaintiff here is entitled to a judgment for the benefits provided.

For the foregoing reasons, the judgment of the court of appeal is amended to award plaintiff any future medical expenses and related benefits according to LSA-R.S. 40:1299.43[12] The judgment of the court of appeal, which upheld a $400,000 award against the Patient's Compensation Fund, is affirmed as amended.

AMENDED AND AFFIRMED.

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[11] LSA-Const. Art I, § 3 provides:
No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capiciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

[12] See Appendix I.

APPENDIX J

CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 83-10059 DIVISION E
FILED Nov 10 89

LYNN BEAUCOUDRAY, ET AL

VERSUS

FRED BRUMFIELD, M.D. &
SOUTHERN BAPTIST HOSPITAL

FILED: _____ _____
DEPUTY CLERK

RULE TO FIX COSTS AND INTEREST PURSUANT TO OPINION OF THE SUPREME COURT OF THE STATE OF LOUISIANA, DATED JANUARY 13, 1989 RULE TO FIX MEDICAL EXPENSES PURSUANT TO LSA-R.S. 40:1299.43; RULE TO FIX ATTORNEY'S FEES PURSUANT TO LSA-R.S. 40:1299.43E(2):

NOW INTO COURT, through undersigned counsel, comes Lynn Beaucoudray, wife of/and James Edward Kelty, Jr., individually and on behalf of their minor child, Ann Mary Kelty who show to the Court that on November 17, 1987 judgment was entered by this Court,". . .declaring that damages exceed the sum of $500,000.00, and that the Patient Compensation Fund is liable to plaintiffs in the sum of $300,000.00, plus interest from the date the claim was filed, in costs, including an expert fee of Dr. Brochin set at $750.00."

This judgment was appealed to the Fourth Circuit Court of Appeal, State of Louisiana (NO.CA-6794) and to the Supreme Court for the State of Louisiana (No. 88-C 2952 c/w 88-C-2985) and the judgment of the trial court was affirmed.

Accordingly, on July 12, 1989, the Patient's Compensation Fund tendered to the plaintiffs the sum of $617,903.00, purportedly in full satisfaction of this judgment. However, the Patient's Compensation Fund did not properly calculate interest, did not pay court costs, and did not pay the expert fees pursuant to the judgment of the trial court. Plaintiffs now seek an order compelling the Patient's Compensation Fund to pay the correct amount of interest, costs and expert fees.

Additionally, plaintiffs now seek an order of this court fixing the amount of "future medicals" from the date of the alleged medical malpractice, namely July 18, 1978, pursuant to the opinion of the Supreme Court of Louisiana, dated September 12, 1989, in the case entitled *Prince A. Williams versus Jack Kushner, et al,* Nos. 88-C-1153 and 88-C-1188.

Furthermore, plaintiffs show to the court that more than thirty (30) days have elapsed since they made demand on the Patient's Compensation Fund for the payment of all medical costs and pursuant to LSA-R.S. 40:1299.43E(2), plaintiffs seek an award of reasonable attorney's fees from the Patient's Compensation Fund unreasonable failure to pay.

Respectfully submitted,

KENNETH V. WARD, JR.
2607 Harvard Avenue
Metairie, Louisiana 70001
(504) 454-5906
Bar Roll No. 13234

O R D E R

Considering the above and foregoing:

IT IS ORDERED that Louisiana Patient's Compensation Fund be and is hereby ordered to show cause on the ____ day of _____, 1989 why they should not be ordered to pay interest, costs, expert fees, future medicals and attorney's fees, all as prayed for.

New Orleans, Louisiana this ____ day of _____, 1989.

J U D G E

CERTIFICATE OF SERVICE

I do hereby certify that I have on this ____ day of _____, 19____, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing same by United States mail, properly addressed, and first class postage prepaid.

KENNETH V. WARD, JR.

APPENDIX K

CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 83-10059 DIVISION "E" DOCKET NO.

LYNN BEAUCOUDRAY, ET AL

VERSUS

FRED BRUMFIELD, M.D. &
SOUTHERN BAPTIST HOSPITAL

FILED: _____ _____
DEPUTY CLERK

EXCEPTION OF RES JUDICATA

NOW INTO COURT, through undersigned counsel, comes the Office of the Attorney General of the State of Louisiana, the Office of the Commissioner of Insurance of the State of Louisiana, and the Louisiana Patient's Compensation Fund, and on suggesting to the Court:

1.

The plaintiffs' claims for payment of future medical expenses have already been ruled on by this Court which denied the claim, which ruling was affirmed by the Fourth Circuit Court of Appeal.

2.

Consequently, plaintiffs' claims are *res judicata* and should be dismissed.

It is suggested that an order issue from this Court dismissing plaintiffs' claims for future medical expenses.

CARRUTH, COPPER AND ADAMS
A LAW CORPORATION

BY: /s/ Ambrose K. Ramsey, III

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CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing has been mailed to all known counsel of record, postage prepaid, this 20th day of December, 1989. Baton Rouge, Louisiana.

/s/Ambrose K. Ramsey, III

AMBROSE K. RAMSEY, III

APPENDIX L

CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 83-10059 DIVISION "E" DOCKET NO.

LYNN BEAUCOUDRAY, ET AL

VERSUS

FRED BRUMFIELD, M.D. &
SOUTHERN BAPTIST HOSPITAL

FILED: _____ _____
DEPUTY CLERK

JUDGMENT ON EXCEPTION OF RES JUDICATA

FOR REASONS ORALLY ASSIGNED in open Court on December 15, 1989:

Present: Kenneth V. Ward, Jr.
Attorney at Law
Suite 201
3209 Ridgelake Drive
Metairie, Louisiana 70002

Representing Plaintiffs James & Lynn Kelty

AND

Ambrose K. Ramsey, III
Carruth, Cooper and Adams
4000 S. Sherwood Forest Blvd.
Suite 500
Baton Rouge, Louisiana 70816

Representing Defendant The Louisiana Patient's Compensation Fund

IT IS ORDERED, ADJUDGED AND DECREED that defendant's Exception of *Res Judicata* regarding the issue of future medical expenses be and it is hereby denied and overruled.

JUDGE, ORLEANS PARISH
CIVIL DISTRICT COURT

APPENDIX M

Lynn Beaucoudray, Wife of/and James Edward KELTY, Jr., etc.

v.

Fred O. Brumfield, M.D., et al.

No. 89—C—2398.

Court of Appeal of Louisiana,
Fourth Circuit.

March 29, 1990.

Medical malpractice action was filed in which Louisiana Patient's Compensation Fund (LPCF) was named as a defendant. Subsequent to the Court of Appeal's affirmance of denial of future medical expenses, plaintiff filed a rule to fix such expensed. The Civil District Court, Parish of Orleans, Gerald Fedoroff, J., denied LPCF's exception of res judicata, and LPCF sought a supervisory writ. The Court of Appeal, Becker, J., held that res judicata barred plaintiff's claim for medical expenses, even though the Supreme Court held in a different case, after the Court of Appeal's affirmance of the denial of future medical expenses but prior to plaintiff's filing of the rule to fix such expenses, that a similarly situated plaintiff was entitled to those expenses.

Writ granted, exception maintained.

Ambrose K. Ramsey, III, Baton Rouge, for relator.

LOBRANDO, PLOTKIN and BECKER, JJ.

BECKER, Judge.

Plaintiff's filed a medical malpractice action against Dr. Fred Brumfield and Southern Babtist Hospital as wel' as the Louisiana Patient's Compensation Fund (LPCF). The doctor and the hospital settled the claims against them and the matter went to trial on November 17, 1987, against the LPCF apparently by stipulation. Judgment was rendered against the LPCF in the amount of $500,000.00, subject to a credit of $200,000.00. However, the trial court refused to award future medical expenses. Plaintiffs appealed the denial of future expenses and their right to a trial onn quantum to contest the $500,000.00 limit on recovery in malpractice cases.

In *Kelty v. Brumfield,* 534 So.2d 1331 (La.App. 4th Cir. 1988), writ denied 536 So.2d 1221, 1222 (La. 1989), this court affirmed the denial of future medical expenses because plaintiffs' claim was filed prior to the 1984 amendment to the Medical Malpractice Act which allowed recovery of future medical expenses in excess of the $500,000.00 limitation. Regarding the constitutionality of the recovery limitation, this court noted its decision in *Williams v. Kushner,* 524 So.2d 191 (La.App. 4th Cir. 1988), writs granted 526 So.2d 785 (La. 1988) where it found the limitation constitutional and stated:

> [4] Plaintiffs argue that they should be allowed to proceed with a trial on the damage issue because they intend to contest the constitutionality of the five hundred thousand dollar limitation. This Court, in *Williams v. Kushner,* 524 So.2d 191 (La. App. 4th Cir. 1988), writs granted 526 So.2d 785, has upheld the constitutionality of the statutory limitation. The Supreme Court has granted writs to consider this issue, but as of the date of this opinion no judgment

has been rendered. Therefore, at this time, plaintiffs have no right to proceed further. *However, should the Williams case be reversed, we reserve to plaintiffs the right to proceed to trial on the issue of quantum.* (Emphasis added)

Kelty, supra, 534 So.2d at 1335.

The Supreme Court in *Williams v. Kushner,* 549 So.2d 294 (La.1989) affirmed this court's decision as it related to the constitutionality of the $500,000.00 limit on recovery, but further ruled that the plaintiffs were entitled to future medical expenses.

The court held:

> [2] In 1984, Act 435 enacted LSA-R.S. 40:1299.43 to provide that the cost of "future medical care and related benefits" is excluded from the $500,000 limitation on recovery. In 1985, the same exception was made with regard to malpractice claims against the state. However, the 1984 private sector act applies only to malpractice claims filed "on or after September 1, 1984," and would exclude the present claim. The 1985 act applis to "pending claims and litigation." Thus, if Mark Williams had been injured at birth in a state facility under the care of a state employee, his future medical expenses could be recovered. Because he was born in a private hospital under the care of a private physician, these expenses are legislatively placed in a different category. This anomaly is a clear violation of the Louisiana constitutional guarantee of equal protection.
>
> Despite wording to the contrary, Act 435 of 1984 must be reformed to apply to claims and litigation pending when it was passed. Plaintiff here is en-

titled to a judgment for the benefits provided.

Id., 549 So.2d at 297. (Footnotes omitted)

On November 10, 1989, plaintiffs filed a rule to fix future medical expenses pursuant to *Williams*. The LPCF filed an exception of res judicata which the trial court denied.

The LPCF complains the trial court erred in denying its exception of res judicata because plaintiffs' right to seek future medical expenses was conclusively adjudicated in this court's prior decision in this case. The LPCF further argues the Supreme Court decision in *Williams* did not reopen plaintiffs' right to seek future medical expenses since the only issue this court left open in the event of a reversal in *Williams* was the issue of "quantum."

In *Kelly*, the following was stated regarding plaintiffs' right to future medical expenses:

[3] Plaintiffs have answered this appeal asserting they are entitled to a trial on the issue of future medical benefits.

Act 435 of 1984 provided for the payment of future medical care and related benefits in excess of the statutory limitation of five hundred thousand dollars. La.R.S. 40:1299.43. However, subsection (A)(6) provided that the Act would be applicable to all claims filed on or after September 1, 1984. In the instant case, plaintiffs filed their claim seeking a medical review panel on April 22, 1983. However, suit was filed in Civil District Court on August 23, 1985.

Plaintiffs argue their "claim" was filed when suit

was instituted, not when they requested the medical review panel. In support thereof, plaintiffs contend that since the panel cannot award damages, but only render an expert opinion, their claim was not filed within the meaning of the act. We disagree.

A prerequisite to the assertion of all malpractice claims against health care providers who are covered by the Medical Malpractice Act is review by a medical review panel. La.R.S. 40:1299.47(A)(2)(a). No action may be commenced in any court unless a claimant has presented his claim before a review panel. La.R.S. 40:1299.47(B)(1)(a)(i). And, legal interest on any judgment accrues from the date of filing for a review panel. La.R.S.40:1299.47(M).

We are satisfied that a "claim is filed" when a plaintiff files a request for a medical review under the provision of La.R.S. 40:1299.47. In order to pursue his claim under the malpractice act, he must comply with those provisions. And when he does so it begins the procedural mechanism which ultimately will resolve the matter. It constitutes the "filing of his claim" within the meaning of La.R.S.

40:1299.43(A)(6). We therefore agree that plaintiff is not entitled to future medical expenses.

This court's prior decision cannot be read as holding open the issue of plaintiffs' right to future medical expenses. This court definitively and without qualification disposed of the merits of the issue of future medical expenses. Plaintiffs were reserved only the right to proceed to trial on the issue of quantum exclusive of future medical expenses.

Therefore, res judicata applies since there is identity of parties, identity of the thing demanded and identify of

cause. R.S. 13.4231 (formerly C.C. art. 2286).**Even though *Williams* apparently makes this court's previous ruling incorrect, plaintiffs cannot avail themselves of this error to revive their claim.** In *Mai v. Mai,* 419 So.2d 1251 (La.App. 3d Cir.1982) the Third Circuit, when the matter first came to them, ruled that a husband's military pension was community, not separate, property. After this decision became final, the United States Supreme Court, in *McCarty v. McCarty,* 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), held that military pensions were not community property. The husband then sought modification of the partition of the community property based on the Supreme Court's decision. The Third circuit held that res judicata applied even though its original decision was based on an erroneous interpretation of the law.

As stated in *Arceneaux v. Texaco, Inc.* 424 So.2d 1107, 1109 (La.App. 1st Cir.1982), writ denied 429 So.2d 134 (La.1983):

> A claim that a prior adjudication was in error is immaterial to the application of res judicata in a following proceeding so long as the requirements of res judicata are met. *Valien v. Prather,* 348 So.2d 229 (La.App. 3d Cir.1977), writ denied 351 So.2d 515 (La.1977).

Accordingly, relator's writ is granted and the exception of res judicata is maintained.

APPENDIX N

The Supreme Court of the State of Louisiana

LYNN BEAUCOUDRAY, WIFE OF/AND
JAMES EDWARD KELTY, JR. ETC.

VS. NO. 90-CC- 0919

FRED O. BRUMFIELD, M.D., ET AL

— — — — — —

IN RE: Beaucoudray, Lynn; Kelty, James Edward Jr.; - Plaintiff(s); Applying for Supervisory and/or Remedial Writs; to the Court of Appeal, Fourth Circuit, Number 89-CW-2398; Parish of Orleans Civil District Court Div. "E" Number 83-10059

— — — — — —

September 6, 1990

Denied.

PH
WFM
HTL
LFC

CALOGERO, C.J., DENNIS & WATSON, JJ., would grant the writ.

Supreme Court of Louisiana
September 6, 1990

/s/ Illegible

Clerk of Court
For the Court

APPENDIX O

The Supreme Court of the State of Louisiana

LYNN BEAUCOUDRAY, WIFE OF/AND
JAMES EDWARD KELTY, JR. ETC.

VS. NO. 90-CC-0919

FRED BRUMFIELD, M.D., ET AL

— — — — —

IN RE: Beaucoudray, Lynn; Kelty, James Edward Jr.; - Plaintiff(s); Applying for Reconsideration of this Court's Order dated September, 6, 1990; Fourth Circuit Court of Appeal Number 89CW-2398; Parish of Orleans Civil District Court Div. "E" Number 83-100

— — — — —

October 5, 1990

Reconsideration denied. The judgment is definitive. La.C.C.P. art. 2166.

HTL
WFM
JCW
LFC
PH

Supreme Court of Louisiana
October 5, 1990

/s/ Illegible

Clerk of Court
For the Court